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74-744
Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

74-744

ISADORE MARION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WO. 2-8745—WO. 2-8732

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ISADORE MARION,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, by his Attorneys, Neil H. Fink, and Frederick B. Bellamy, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Second Circuit.

1. OPINIONS BELOW

Petitioner was convicted in the United States District Court for the Southern District of New York by a jury on November 27, 1973 of Violation of Title 18, United States Code, § § 894 and 1952. Petitioners filed a timely notice of appeal on November 28, 1973 set forth as Appendix C. On March 1, 1974, the Second Circuit Court of Appeals affirmed the convictions via a per curiam opinion, set forth *infra,* as Appendix D.

2. JURISDICTION

The opinion and judgment of the Second Circuit Court of Appeals was entered on March 1, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

3. QUESTIONS PRESENTED

The questions presented by your petitioner are: (A) Whether, with regard to Counts one and two of the Indictment, there was sufficient evidence on which the jury would find beyond a reasonable doubt that a co-conspirator had committed an overt act in furtherance of the conspiracy. (B) Whether the charges in the instant Indictment were sufficiently specific as to protect the Appellant from being placed more than once in jeopardy for the acts alleged.

4. STATUTES AND CONSTITUTIONAL PROVISIONS

Title 18. United States Code, Section 894 states in part as follows:

> "Section 894. Collection of extensions of credit by extortionate means. (A) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> 1. to collect or attempt to collect any extension of credit, or
>
> 2. to punish any person for the non-repayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both."

Title 18, United States Code, Section 1952 states in part as follows:

> "§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> 1. distribute the proceeds of any unlawful activity; or
>
> 2. commit any crime of violence to further any unlawful activity; or
>
> 3. otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

5. STATEMENT OF THE CASE

The Indictment

Count 1 of the Indictment charged that the Petitioner, along with two other named defendants[1] and "other persons to the Grand Jury unknown", entered into a conspiracy to use extortionate means to collect an extension of credit made to a "John Doe" in the "State of California". Count 2 of the Indictment charged a violation of the "Travel Act", Title 18, United States Code, Section 1952, on the theory that the Petitioner used a facility in interstate commerce, to wit: a telephone to "promote" the unlawful activity of extortion in violation of the Penal Laws of New York, Nevada and California.

The Trial

This rather unusual "extortion" prosecution was founded almost exclusively on judicially sanctioned interception of telephone calls between the alleged co-conspirators during February, March and April of 1972. The unusualness of the instant case is marked by the failure of the Indictment and the Government's proof at trial to identify the target or "victim" of the extortion conspir-

[1] The defendant, Vincent Rizzo, entered a plea of guilty prior to trial. The defendant, William Robertazzi, was acquitted by the Trial Court at the end of the Government's case.

acy. Indeed, early in the trial, the prosecuting attorney announced that "the United States was never able to find out who the victim was".

In view of the nature of the prosecution, the witnesses who actually testified at trial were called for the single purpose of laying a proper foundation for the introduction of the tape recordings and were of relatively minimal importance. By stipulation and by the testimony of employees of both the Central Telephone Company, Las Vegas, Nevada and the New York Telephone Company, a foundation was laid for a finding that the recorded telephone conversations were interstate calls. Other witnesses, including a New York City Police Officer, a special agent of the Federal Bureau of Investigation, and a telephone operator at the Del Monico Hotel in New York City established voice identification and identification of the co-conspirators.

The crux of the Government's case, therefore, was the tape recordings themselves which were introduced into evidence as Government's Exhibits 7 through 12.

Exhibit 7, the first telephone call admitted into evidence, was a tape recording of a conversation between the Petitioner, Marion, and one Vincent Tortora on February 8th, 1972. This conversation was alleged to contain a "prior similar act" concerning extortive activity in the State of New Jersey. With regard to this activity as well, there was no evidence of extortion or conspiracy presented other than the conversations contained on the tape. On the following day, February 9th, 1972, at 4:00 p.m., there was recorded a conversation between the Petitioner, Marion, and the defendant, Rizzo. This conversation was later introduced into evidence as Government Exhibit 8. Considering the evidence in the light most favorable to the Government, this was the first conversation on which it could

be found that an agreement had been entered into to collect a debt from the unidentified party. Over the next two months, there occurred three arguably relevant conversations, regarding plans to effect the agreement to collect the money.

After the playing of these tape recordings, the Government, with nothing further, rested its case. The Petitioner, Isadore Marion, called no witnesses on his own behalf.

6. REASONS FOR GRANTING THE WRIT

(a)

On the government's theory of conspiracy, it was necessary as to each of the two counts of the Indictment to prove an overt act committed by a co-conspirator in furtherance of the conspiracy.[2] In his charge to the jury, the Court instructed, in effect, that with regard to both counts, they must find an overt act in furtherance thereof.

As indicated in the Statement of the Case, there was here no proof of the acts alleged in the Indictment other than the recorded conversations between the co-conspirators. According to the pleadings, there were alleged to have been four overt acts committed in furtherance of the conspiracy. These were the telephone conversations of February 9th, March 16th, March 17th and April 9th, 1972. (Count 1 of the Indictment). Petitioner now sub-

---

[2] While no separate conspiracy was pleaded with regard to a Section 1952 violation, the Government's theory was that the Appellant "promoted" an unlawful activity which the Court apparently accepted as analagous to conspiracy. In view of the concurrent sentences, the Petitioner only parenthetically challenges the variance between charging a substantive violation of Section 1952 and proving only a conspiracy.

mits, as was submitted in the Trial Court, that each of these conversations evidenced nothing more than a conspiratorial agreement and that the Government failed to prove the essential requirement of an overt act in furtherance of that agreement.

As stated, the first overt act pleaded in the Indictment is the February 9th conversation between the defendant, Rizzo, and the Petitioner, Marion. A plain reading of the transcript of this call indicates clearly that it is the genesis of the agreement which is alleged to have violated two federal criminal statutes. Therefore, the conversation of February 9th must be immediately excluded when canvassing the proof for an overt act. It is clear that the agreement which forms the alleged conspiracy cannot also be the overt act. *United States v. Sarno,* 456 F.2d 875 (1st Cir., 1972). The questions for this Court's consideration, therefore, is whether the remaining telephone calls, particularly those of March 16th, 17th and April 9th, satisfied the overt act requirement. *United States v. Falcone,* 311 U.S. 205 (1940). To make this determination, a closer look at the content of these conversations is required.

As outlined above, the next revelant conversation after February 9th occurred on March 16th between the Petitioner, Marion, and William Robertazzi, who was acquitted of the conspiracy by the Trial Court. Although the majority of this conversation is highly irrelevant, some portions arguably conform to what had been discussed between the Petitioner, Marion, and the defendant, Rizzo. However, these portions were so equivocal that the Trial Court found them insufficient to send Robertazzi's case to the jury. Similarly, the conversation of March 17th, between Marion and Robertazzi was again only arguably relevant and found by the Trial Court not to sufficiently connect Robertazzi

to the alleged crime. Concededly, the conversation of April 9th, 1972 between the Petitioner, Marion, and the defendant, Rizzo, stands on somewhat of a different footing. The question remains, however, as to whether this conversation constituted an overt act. It is interesting to note that, at the outset of the conversation, the Petitioner tells Rizzo that "I can't get ahold of this guy." This candid admission seems to paraphrase the flaw in the Government's case. Beyond this the conversation mainly concerns plans for actions to be taken in the future and the agreement that Marion is to get "heavy" with the unknown subject.

Once again, considering the evidence in the light most favorable to the Government, it is readily apparent that the "agreement" stage of the conspiracy had been effected. The issue is whether the subsequent calls demonstrated more than a subjective mental intent to commit a crime on the part of the conspirators. The need to prove more than a subjective mental intent is said to provide the legal necessity of proving an overt act. *United States v. Small,* 472 F.2d 818 (3rd Cir., 1972). Here, it is submitted, neither the telephone calls nor any other proof developed at trial, sufficiently demonstrate more than that subjective mental intent to commit a crime.

To better demonstrate Petitioner's position, it may be helpful to draw a hypothetical analogy. Academicians have long illustrated the law of conspiracy with the following example: If two conspirators met and planned to kidnap an unknowing victim, the agreement, whether it be discussed for days, months or years, does not constitute a crime until and unless an overt act is committed in furtherance of that plan or agreement. And the act itself need not be illegal as long as it demonstrates an objective intention to carry out the agreement. As stated in *United States v. Gisehaltz,* 278 F. Supp. 434 (S.D. N.Y., 1967):

> "In addition, since our jurisprudence does not punish for mere thought, there must be the commission of at least one pleaded overt act by one of the conspirators during the life of the conspiracy in furtherance of the aims and purposes of the conspiracy. The overt act may be legal or illegal in nature."

For example, if rope were purchased to bind the kidnap victim, the participants would be liable for violation of the conspiracy law. Returning to the instant case, the plan or agreement between the Petitioner and the defendant, Rizzo, cannot be found to have ripened into a criminal violation unless and until an overt act was performed. On the evidence contained in Government's Exhibits 7 through 12, it is submitted, there is no substantial evidence on which a jury could find, beyond a reasonable doubt, that such an overt act had been performed. *United States v. Taylor,* 464 F.2d 240 (2nd Cir., 1972); *Holland v. United States,* 348 US 121 (1954).

In the example drawn above, if the purchase of rope had been discussed on numerous occasions and one of the conspirators stated in subsequent conversations that he had made efforts to purchase the means of the crime when in fact he did not, there would be insufficient evidence to prove the overt act. In the instant case, there is absolutely no evidence to indicate that the Petitioner, Marion, was doing more than agreeing or planning with Rizzo. There is no indication that an objective act was committed in furtherance of that agreement. In *United States v. Jackson,* 426 F.2d 305 (5th Cir., 1970), it was stated by the Court that

> "If the evidence leaves it wholly uncertain whether the crime charged has been committed or not, the defendant must be acquitted . . . " *426 F.2d at p. 309.*

In the instant case, it is wholly uncertain whether an overt act had been committed, that is anything more than a plan or agreement between the Petitioner and Rizzo. There is no doubt that the Petitioner made it appear to Rizzo as if steps had been taken to further the conspiracy. But, however, there was no evidence to support a finding that any such steps had *in fact* been taken.

The decision of the Circuit Court of Appeals is in marked conflict with another recent decision by that bench: *United States v. Marrapese,* — F.2d — (2nd Cir., October 26, 1973, slip. op 192, p. 193). In *Marrapese,* the Appellant unsuccessfully urged that the case should not have been submitted to the jury because there was no proof of an overt act. There, there was what Judge Moore described as a "solid factual foundation" which demonstrated that a number of machine guns had been stolen from a National Guard Armory and hidden in an underwater quarry. A later recorded conversation identified the Appellant's participation in the conspiracy. In affirming the conviction below, the Court called attention to the Trial Court's opinion that

> "the concealment of the M-16 rifles, independently proven, is the very essence of the third overt act."

As in *Marrapese,* the Government here has erected an inferential superstructure. However, conspicuously absent in the case at bar is the "solid factual foundation" which underlies that superstructure. There is here no independently proven overt act which was the essential ingredient

in *Marrapese*. All that is present in the case at hand is a series of plans or agreements. There is no evidence on which the jury could find, beyond a reasonable doubt, that, indeed, something more, an overt act had been committed.

(b)

The second issue presented to the District Court and the Court of Appeals was that the Government's failure to identify the alleged victim of the extortion conspiracy deprived the petitioner of the protection of the double jeopardy clause of the Fifth Amendment to the U.S. Constitution.

The unusual nature of this case is found in the fact that neither the Indictment nor the proof at trial reveals the identity of the person whom the Appellant and other allegedly conspired to extort. Such a situation is apparently unprecedented in extortion prosecutions. Admittedly, the testimony of a "victim" was not necessary to sustain the Government's burden in proving guilt beyond a reasonable doubt. However, the failure to name the victim raises two very significant issues of constitutional dimension. The first question is whether the Petitioner was sufficiently informed of the "nature and cause" of the accusation in accordance with the Sixth Amendment to the United States Constitution, and second, whether the Petitioner has been afforded the protection of the Fifth Amendment double jeopardy clause. For purposes of this argument, the two provisions are inextricably merged.

Prior cases which have dealt with attacks on Indictments which fail to specify the "victim" of an extortion have consistently viewed the problem in terms of a defendant's preparation for trial and the Grand Jury's role to

record with certainty the crimes charged so that the prosecutor is not free to roam at large in presenting his case. *United States v. Tomasetta,* 429 F.2d 978 (1st Cir., 1970); *United States v. Agone,* 302 F. Supp. 1258 (S.D.N.Y., 1969); *United States v. Rosner,* 352 F. Supp. 915 (S.D.N.Y.), [indictment's failure to name recipient of bribe]; *Russell v. United States,* 369 U.S. 749 (1962); *United States v. Annoreno,* 460 F. 2d 1303 (7th Cir., 1972). The extraordinary feature of the instant case lies in the fact that neither the Indictment, the Bill of Particulars nor the proof at trial identifies the victim of the extortion conspiracy. The issue here, therefore, goes well beyond the sufficiency of the Indictment and rests upon the failure of the judgment to adequately protect the Petitioner against being placed in jeopardy twice. This problem was briefly recognized by Judge Frankel in *United States v. Agone, supra.* In *Agone,* where the Indictment was dismissed because of failure to identify the extortion victim, the District Court stated that:

> "We may assume (though there is no ground for certainty) that further developments in the case would supply protection against double jeopardy." *302 F. Supp. at p. 1261.*

In the instant case, it is submitted, the development of proof has failed to supply protection against double jeopardy.

In *United States v. De Cavalcante,* 440 F. 2d 1264 (3rd Cir., 1971), in exploring the sufficiency of the indictment, the Court considered the following when placing the issue in the proper context.

> "In considering this point, it is important to note first what questions are not raised on this appeal concerning the indictment. There is no Sixth Amend-

> ment problem of adequate notice to the defendants of the crime charged. (Citing cases.) Defendants concede that the letter from the Assistant United States Attorney more than five months before trial adequate apprised them of the Government's theory of the case. Similarly, there is no problem of insufficiency particularly of the charge in the indictment. The requirement of particularity not only serves a notice function, but also helps implement the Fifth Amendment protection against being put twice in jeopardy for the same offense. See *Russell v. United States, supra,* 369 U.S. at 763-764, 82 S. Ct. 1038. The indictment here clearly charged the crime of extortion in violation of 18 U.S.C. §1952, identifying with ample specificity for double jeopardy purposes, the time, place and circumstances of the crime. See Fed. R. Crim. P. 7(c). 440 F. 2d. at p 1269.

In the instant case, also, no problem is raised as to the adequacy of the notice to the Petitioner of the crime charged. The production of the tape transcripts and relevant materials substantially prior to trial was sufficient notice of the crime charged. However, as noted by the *De Cavalcante* court, the requirement of particularity goes beyond the notice function, but is also relevant to the Fifth Amendment protection against being put twice in jeopardy for the same offense. Here, Petitioner alleges, the indictment and the evidence adduced at trial have, for double jeopardy purposes, failed to adequately specify the circumstances of the crime in the failure to identify the alleged victim. In *Price v. Georgia,* 398 U.S. 323 (1970), the Supreme Court stated with regard to the double jeopardy clause that:

> "The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *398 U.S. at p 326.*

The conviction herein clearly does not supply protection againt that risk. If an Indictment were returned today which charged an extortion conspiracy against another individual whether named or unnamed, there is no ample way to demonstrate that those new charges were contained in the prosecution at bar.

7. CONCLUSION

Wherefore, by reason of the foregoing premises, petitioner prays that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit and hear this case on the merits.

Respectfully submitted,

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962-7070

APPENDIX A

UNITED STATES DISTRICT COURT
for the Southern District of New York

United States of America
v
Vincent Rizzo, Isadore Marion and William Robertazzi,
Defendants.
No. 72 CR 1332

INDICTMENT

The Grand Jury charges:

1. From on or about February 9, 1972 and continuing thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Vincent Rizzo, Isadore Marion and William Robertazzi, the defendants herein, and other persons to the Grand Jury unknown, unlawfully, wilfully (sic) and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Section 894.

2. It was part of said conspiracy that the defendants would participate in the use of extortionate means, that is, means involving the use of evpress and implicit threats of

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the defendants, in the Southern District of New York and elsewhere, committed and caused to be committed the following:

1. On or about February 9, 1972, the defendants Vincent Rizzo and Isadore Marion had a telephone conversation.

2. On or about March 16, 1972, the defendants Isadore Marion and William Robertazzi had a telephone conversation.

3. On or about March 17, 1972, the defendants Isadore Marion and William Robertazzi had a telephone conversation.

4. On or about April 9, 1972, the defendants Vincent Rizzo and Isadore Marion had a telephone conversation. (Title 18, United States Code, Sections 891(7) and 894).

Count Two

The Grand Jury further charges:

From on or about February 9, 1972, and continuing thereafter up to the date of the filing of this indictment, in the Southern District of New York and elsewhere, Vincent Rizzo, Isadore Marion and William Robertazzi, the defendants herein, did unlawfully, wilfully (sic) and knowingly travel and cause travel in interstate commerce, and did use and cause to be used a facility, to wit, extortion in violation of Section 115.30 of the New York Penal Law, and of Sections 205.320 and 518-520 of the Nevada and California Penal Codes, respectively, and with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity, and thereafter the said defendants did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity.

(Title 18, United States Code, Sections 1952 and 2)

Whitney North Seymour, Jr.
United States Attorney for the Southern District of New York

APPENDIX B

UNITED STATES DISTRICT COURT
for the Southern District of New York

United States of America,
v
Isadore Marion.
} No. 72 CR 1332

JUDGMENT AND COMMITMENT

On this 27th day of November, 1973, came the attorney for the government and the defendant appeared in person and by James P. La Rosa, Esq. (sic),

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty by a jury, has been convicted of the offense of unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together and with each other to participate in the use of extortionate means to collect and attempt to collect extensions of credit. (Title 18, U.S. Code, Sec. 891(7) and 894). Unlawfully, wilfully and knowingly travel and cause travel in interstate commerce, used and caused to be used a telephone, in interstate commerce with intent to commit extortion. (Title 18, U.S. Code, Sec. 1952 and 2), as charged in counts 1 and 2, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is sentenced to Five (5) Years on Count 1. Execution of prison sentence is suspended. Defendant is placed on probation for a period of Five (5) Years, subject to the standing probation order of the court. Ct. 2 Imposition of sentence is suspended, defendant is placed on probation for a period of Five (5) Years, subject to the standing probation order of the court; and fined $3,000 on ct. 1. Fine to be paid within 60 days

or the defendant is to be committed until the fine is paid or he is otherwise discharged according to law.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ Frederick van pelt Bryan
United States District Judge
/s/ Raymond F. Burghardt
Clerk

A True Copy
Raymond F. Burghardt, Clerk
By: /s/ Walter J. Freeman
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
for the Southern District of New York

United States of America,
v
Isadore Marion,
Defendant.
No. 72 CR 1332

NOTICE OF APPEAL

Sir:

Please take Notice that Isadore Marion hereby appeals to the United States Court of Appeals for the Second

Circuit from a Judgment of Conviction entered against him by the Hon. Frederick van Pel Bryan on November 27th, 1973, wherein the defendant was sentenced on Count 1 of the Indictment charging him with violation of Title 18, United States Code, Section 894, to five years imprisonment with the execution of sentence suspended and on Count 2 of the Indictment charging the defendant with violating Title 18, United States Code, Section 1952, defendant was sentenced to a suspended term of imprisonment. In addition, the defendant was fined in the amount of Three Thousand ($3,000.00) Dollars.

Dated: New York, New York
November 27th, 1973

Yours, etc.

James M. La Rossa
Attorney for Defendant
Isadore Marion
Office and P.O. Address
522 Fifth Avenue
New York, New York 10036
687-4100

To:

Hon. Paul J. Curran
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

APPENDIX D

UNITED STATES COURT OF APPEALS
for the Second Circuit

United States of America, Plaintiff-Appellee, v Vincent Rizzo, Isadore Marion and William Robertazzzi, Defendants, Isadore Marion, Defendant-Appellant.	73-2804

JUDGMENT AND ORDER

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of March one thousand nine hundred and seventy-four.

Present: Hon. Irving R. Kruman, Chief Judge, Hon. Walter R. Mansfield, Hon. William H. Mulligan, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk
By: Vincent A. Carlin,
Chief Deputy Clerk